United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1405

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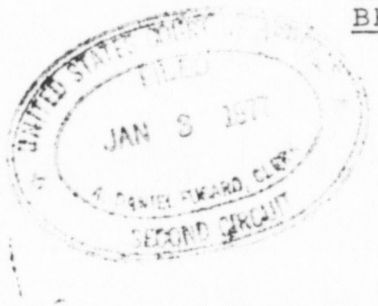
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x
:
UNITED STATES OF AMERICA,
:
Appellant,
:
-against-
:
MICHAEL KAZUO YANAGITA
and MARC CHOYEI KONDO,
:
Appellees.
:
- -x

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF FOR APPELLEES



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-against- : No. 76-1405

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal by the government from an order entered by the District Court for the Eastern District of New York (Hon. John F. Dooling) dismissing informations charging each of the appellees with having wilfully disobeyed orders to answer questions put to them at a trial of U.S. v Chin and Young, 75 CR 851(S), in violation of Title 18 U.S.C. Section 401(3). The opinion of the District Court containing its findings and conclusions is reported as U.S. v. Yanagita and Kondo, 418 F.Supp. 214 (EDNY, 1976).

The charges against appellees and the instant appeal arise from the following facts.

A two count indictment charged Kenneth Chin (hereinafter Chin) and Elizabeth Young--now Elizabeth Youhg Chin (hereinafter Young Chin)--

with unlawful interstate transportation of four firearms, in violation of 18 U.S.C. Sections 922(a)(3) and 2 and with conspiracy to commit the aforesaid offense, in violation of 18 U.S.C. Section 371. (Government Appendix (hereinafter "A"), 298-299).

In April, 1976, Young Chin was tried alone. Appellee Yanagita appeared as a witness pursuant to government subpoena but counsel for both sides then entered into a stipulation which obviated the need for Yanagita's testimony; he was excused from said trial and instructed to return on April 20, for the trial of Mr. Chin.

On Friday, April 16, the defendant Young Chin was acquitted on the conspiracy count; the jury could not agree as to a verdict on the substantive count and a mistrial thereof was declared.

On the following Monday, April 19, the government obtained a superseding eight count indictment charging each of the Chins with unlawful interstate transportation of the same four firearms AND with unlawful receipt of the same firearms (A.300-303). Yanagita and Kondo were each subpoenaed by the government for their joint trial, to begin June 21, 1976. It was the government's theory Yanagita had transferred two of the firearms to the defendants and Kondo had transferred a third. The fourth firearm the Chins were each accused of transporting interstate and receiving was admittedly unrelated to Yanagita or to Kondo.

Prior to trial, Yanagita and Kondo, alleging the questions they were to be asked were derived from illegal electronic surveillance of them and setting forth facts in support of their respective claims, moved that the government affirm or deny in meaningful terms whether

or not it had conducted electronic surveillance of them. When called as witnesses, each declined to testify on the basis of his Fifth Amendment privilege and on the basis of the claim of electronic surveillance. The government applied, pursuant to 18 U.S.C. Sections 6002-03, for orders to compel each of them to testify, which orders were entered by Hon. Jacob Mischler, the trial judge (A. 105-106).[1]

When both witnesses thereafter declined to testify they were held in contempt (A. 304-307). Judge Mischler ruled that the government had adequately responded to the claims of electronic surveillance of the witnesses, that the immunity granted them was sufficient to protect their Fifth Amendment rights, and that the government's applications for the orders compelling testimony were properly made. An application for a stay pending appeal was denied by Judge Mansfield.

Jury verdicts of guilty were returned as to Young Chin on counts 1 and 3 and as to Chin on counts 1 - 4. The Court had dismissed counts 2, 4, 6 and 8 as to Young Chin. Jury verdicts of not guilty were returned as to Young Chin on counts 5-7 and as to Chin on counts 5-8. Thereafter, the Court set aside the verdicts on and dismissed count 3 as to Young Chin and counts 3 and 4 as to Chin. (See A. 300-303 for the full indictment). Each defendant was sentenced to probation for a term of three years.

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1. The directive to Kondo to testify was made orally. No written order was ever entered.

On June 24, while the Chins were on trial and while Yanagita and Kondo were incarcerated pursuant to Judge Mischler's contempt adjudications and the resultant commitment orders, the government filed informations charging appellees with contempt for their refusals to obey Judge Mischler's order to testify (A.5-6). The informations charged each of them "did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that /each/ refused to answer any questions asked of him" during the Chin trial after having been given an order to answer questions. This was alleged to be in violation of 18 U.S.C. Section 401, which provides in pertinent part:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
> (3) Disobedience or resistance to its lawful ...order..."

Appellees initially appeared before Judge Mischler for arraignment on June 25. When their counsel requested a schedule which would allow the filing of motions, Judge Mischler inquired whether one of the motions contemplated was a motion to disqualify him for bias. Counsel responded in the affirmative. Judge Mischler thereupon sua sponte disqualified himself from the instant case[2], which was then assigned to

2. The bases for the motion included a totally unfounded accusation by Judge Mischler that co-counsel for appellees, Ms. Gladstein, had waved her fist as a spectator at a hearing before Judge Mischler in an unrelated matter. Ms. Gladstein had in fact never been in Judge Mischler's courtroom as spectator or counsel before the instant case. Judge Mischler also had made several sarcastic and gratuitous remarks to counsel for appellees.

Judge Dooling.

In July, appellees filed a motion to dismiss the informations as in violation of the double jeopardy clause. In their supporting memorandum of law appellees also briefed three other issues they intended to present by way of motion for judgment of acquittal. (See footnote on A.240-241). After full briefing and oral argument by both sides, Judge Dooling entered an order dismissing the information against each appellee upon the ground the government had failed to respond adequately to appellees' claims of electronic surveillance and, further, as to Kondo, that the government's application for an order compelling him to testify was invalid.

ARGUMENT

I. THE ORDERS DIRECTING APPELLEES TO TESTIFY WERE ENTERED WITHOUT THE GOVERNMENT HAVING MADE A LEGALLY SUFFICIENT RESPONSE TO APPELLEES' CLAIMS OF ELECTRONIC SURVEILLANCE AND WERE THEREFORE NOT LAWFUL ORDERS.

The Basic Legal Principles

The gravaman of the charge against appellees is that each disobeyed a "lawful" order of the Court that he testify at the Chin trial.[3] If the order to testify was not a lawful one, appellees could properly decline to follow it. U.S. v. DiMauro, 441 F.2d 428, 435-437 (8 Cir. 1971). Thus the key question is the lawfulness of the orders directing

3. This is the language of 18 U.S.C. Section 401(3) and the informations filed against appellees.

appellees to testify.

It is firmly established that a witness in a federal criminal trial has the right pursuant to 18 U.S.C. Section 2515 to decline to answer questions derived in whole or part from unlawful electronic surveillance of the witness. U.S. v. Huss, 482 F.2d 38 (2 Cir. 1973); In re Horn, 458 F.2d 468 (3 Cir. 1972); c f. In re Allen, 12 Crim.L.Rep. 2343 (D.C. Cir. 1973).[4]

In Huss, Chief Judge Kaufman for a unanimous Court dealt explicitly with the claim of a trial witness:

> "We need not tarry over the question whether Siegel has standing to object to questions on the basis of wiretap taint, despite his posture as a witness and not a defendant in a criminal prosecution. The government concedes that such standing is conferred by statute, see 18 U.S.C. Sections 2510(11), 2515 and 2518(10), and inasmuch as the Supreme Court reached the same conclusion with respect to the more difficult question of a grand jury witness' standing, see Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972), we believe the rule applies a fortiori to this case." 482 F.2d at 44.

See also the opinion of the lower court in Huss reported sub nom. U.S. v. Cohen, 358 F.Supp. 112, 117-118 (SDNY, 1973).[5]

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4. Section 2515 provides in pertinent part: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury...or other authority of the United States...if the disclosure of that information would be in violation of this chapter." See Section 2511(1)(c) prohibiting disclosure of the contents of any wire or oral communication except under narrowly drawn circumstances.

5. Nor need we tarry over what the government terms its "threshold argument", Government brief 16 (hereinafter "Gb") that a trial witness may

In order to effectuate his statutory rights a witness may invoke 18 U.S.C. Section 3504 which, upon a claim of illegal governmental electronic surveillance of the witness, requires the government to "affirm or deny"the occurrence of the alleged surveillance.[6] If the government fails to make a response which is legally sufficient, the witness may decline to testify notwithstanding a court order requiring him to do so. E.g., In re Quinn, 525 F.2d 222 (1 Cir. 1975); U.S. v. Vielguth, 502 F.2d 1257 (9 Cir. 1974); U.S. v. Alter, 482 F.2d 1016 (9 Cir. 1973); In re Stavins, No. 71-201 (D. Mass. 1972) (quashing subpoena where government affidavit held legally insufficient to respond to witness' claim of electronic surveillance).

Phrased in terms of Section 401(3), an order to testify at a trial entered after a claim of electronic surveillance has been properly made is not lawful unless the government has, prior to and as a basis for its

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not decline to answer questions on the ground they may be derived from illegal electronic surveillance if the witness has had ample notice of his appearance and the facts upon which his claim is based. This is but a sideways effort to reargue Huss, supra to the very Court which decided it. In Huss a witness who had several months notice he would be a trial witness filed a motion three days before the expected commencement of trial objecting that the questions he would be asked would be based upon illegal electronic surveillance the existence of which had been publicly known for approximately two years. See U.S. v. Bieber, 71 CR 479 (EDNY July 23, 1971); also U.S. v. Schwartz, 71 CR 977 (EDNY, Sept. 16, 1972). This Court upheld the trial witness' statutory right despite these circumstances and despite the fact his claim required a postponement of an important trial for almost four months in order to conduct a taint hearing.

6. Section 3504 provides: "(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--(1) upon a claim by a party aggrieved that evidence is inadmissible because it is

entry, made a meaningful denial of that claim. As the New York Appellate Division noted in People v. Einhorn, 45 AD2d 75, 356 NYS2d 620, rev'd on other grounds, 35 NY2d 948, 365 NYS2d 171, 324 NE2d 551 (1974), in reviewing a criminal contempt judgment founded upon refusal to obey a court order to testify before a grand jury, thewitness and his counsel were entitled to "know exactly what they were up against." 356 NYS2d at 624. The Court responded directly to the contention that a legally sufficient response to the claim of surveillance need not be made prior to the time the witness is required to testify but only at a subsequent hearing on a charge for criminal contempt based upon a refusal to testify:

> "To say that no harm can come to the witness who faces such a crucial decision, because he can always have a suppression hearing in conjunction with his trial for contempt, is to overlook the fact that the time for the witness to have the information which, according to federal law he is entitled to have, is during the grand jury proceedings, when he is to make his choice as to whether he will or will not answer the questions propounded to him." Id.[7]

The Claim of Electronic Surveillance

Confronted with a response that, as the government itself concedes,[8] is otherwise insufficient as a matter of law, the government has sought

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the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act..."

7. Thus the government's representation it is now prepared (some six months after each had to decide whether or not to testify,) to respond properly to appellees' claims under Sec. 3504 (Gb 19), is of no consequence in this case.

8. Gb 20.

to create the impression appellees' claim was unduly delayed. Since its basic method has been to misstate the facts, regrettably some recapitulation of what actually happened is required.

Appellees each reside in southern California. Kondo, who the government had not subpoenaed in the first trial, was served with a subpoena returnable Monday, June 21. Because Kondo lived in California, counsel were not able to meet with him to discuss his legal situation prior to his coming to New York. Counsel so advised Ethan Levin-Epstein, the Assistant U.S. Attorney prosecuting the Chin case, and asked whether arrangements could be made so that Kondo could travel to New York a few days in advance of the trial in order to confer with counsel. Levin-Epstein made arrangements so that Kondo could travel to New York the evening of Thursday, June 17. This was the first time Kondo had been in New York since being subpoenaed.

Counsel met with Kondo for the first time at their offices on Friday, June 18. In the course of discussion, facts were disclosed which led counsel to believe the prospective trial questioning of Kondo might be derived from electronic surveillance of him or his residence. Kondo was informed that if this were true he would have the right to decline to answer such questions. Accordingly, motion papers were prepared together with affidavits setting forth the facts Kondo had disclosed to counsel which formed the basis of his claim of surveillance.

Appellee Yanagita arrived in New York on Sunday, June 20 and met that day with counsel. Armed with the facts disclosed in the discussion

with Kondo two days earlier, counsel questioned Yanagita as to the possible basis for a belief he or his residence had been the subject of surveillance. The facts thereby adduced were likewise incorporated into affidavits and a motion prepared.

The Making of the Claim of Electronic Surveillance

One is given the impression by the government that appellees' claim of surveillance was raised initially in the middle of the Chin trial. The reader is told the claim was made "in the midst of the trial" (Gb 4), that it was not made "until after the start of the trial" (Gb 17), that it was raised "in the middle of a trial" (Gb 19).

Perhaps the reason the exact timing of the claim is never pinpointed by the government is that it contradicts the government's constant refrain that it came in the midst of trial. Assistant U.S. Attorney Levin-Epstein was served with appellees' papers prior to the commencement of any proceedings on Monday, June 21, the date the trial began, a fact Levin-Epstein acknowledges at page 6 of the transcript in the Chin case, and the motions for disclosure of electronic surveillance were made at page 10 of the Chin transcript, prior to completion of argument by counsel for Young Chin of a pre-trial motion.[9] Thus, contrary to the representations in the government's brief to this Court, the claim of the electronic surveillance was made prior to the commence-

9. The transcript of the Chin trial is part of the record on appeal in U.S. v. Chin and Young, No. 76-1420, scheduled to be argued the week of February 28, 1977.

ment of the Chin trial.

The trial court in this case considered and rejected the same argument regarding timeliness,[10] the government makes here:

> "[T]here was not a sufficient evidentiary base to support a conclusion that the motion was unduly delayed and could not be regarded as timely." 418 F.Supp. at 218. (A. 312)

The finding of the District Court is amply supported by the record.

The record shows that on the first day that counsel were able to meet with Kondo and discuss his legal situation they obtained the facts forming the basis of the claim of electronic surveillance and that the appropriate pleadings were promptly drawn. Further, that based upon the disclosures by Kondo counsel made similar inquiries of Yanagita, that pleadings appropriate to the latter's responses were promptly drawn, that appellees' pleadings were served and filed at the very beginning of the first day of Court following their disclosure to counsel,[11] which serving and filing was accomplished before the Chin trial even began.[12] Further, had any such motions been filed prior to disclosure of the facts obtained from Kondo on the Friday preceding trial they would not have been sufficient to make out a claim under Section 3504 requiring a

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10. See Government Brief in District Court 13 (A.128).

11. That appellees may have had in their possession facts tending to indicate electronic surveillance prior to Kondo's coming to New York does not, contrary to the government's intimation, e.g., Gb 19, carry any legal consequence. Obviously, knowledge of the legal significance of such facts or even whether such facts are sufficient to constitute a claim under Sec. 3504 could not properly be imputed to a layman without legal training. The relevant question is when did appellees' counsel learn of these facts.

12. See A.271-272; see also June 22, 1976 Affidavit of James Reif, paragraphs 8-13 in support of Motion For Stay or Bail Pending Appeal

government response. C f., In re Millow, 529 F.2d 770 (2 Cir. 1976).

Finally, we note the government's contention is not only unsupported by the actual facts, it is likewise unsupported by the law. The government has been unable to cite a single case which even remotely suggests appellees' claim was not timely.[13]

The Claim of Electronic Surveillance and the Government's Response

Appellees' requests the government "affirm or deny" electronic surveillance conducted by it on appellees or their premises were based on the following facts:

When questioned by an agent from the Bureau of Alcohol, Tobacco and Firearms, appellee Kondo was shown a paper containing information which had been discussed in a telephone conversation between Kondo and the defendant Young Chin in August, 1975 (which is within the period of time during which the crimes alleged in the Chin indictment were committed). Kondo informed counsel that to the best of his knowledge the government could only have acquired this information through overhearing the aforementioned telephone conversation. In response to further inquiry, Kondo said he had encountered several unusual difficulties in

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in In the Matter of Kondo and Yanagita, No. 76-1277 (2 Cir.) (on file with this Court as part of the record in No. 76-1277).

13. Although, as shown, appellees' claim was raised prior to the commencement of trial, we do not wish to be understood as suggesting a claim raised after commencement would be per se untimely. It is certainly possible a trial witness' claim of electronic surveillance made after trial begins could be heard and resolved witnout unduly delaying such a trial. We also note there is no statute which suggests such a cut off point. Section 2518(10)(a) refers to

his telephone communications. These included repeated inability to reach a number dialed except with the assistance of an operator, frequent inability to get a dial tone, hearing voices on the line other than those of the person to whom Kondo was talking, hearing a sound resembling that of a tape recorder, and a visit from a man claiming to be from the phone company and who further claimed he was under Kondo's house to repair the phone, although Kondo had no knowledge or expectation a repairman was to be there on that occasion. Yanagita related a frequent inability to obtain the normal dial tone on his phone, that he would hear a series of clicks which in Los Angeles should only occur on a call placed outside the message unit area but which had occurred on calls placed inside that area, that he would frequently hear voices on his line other than those of the person(s) with whom he was communicating, and that he had often encountered static so severe that a conversation had to be discontinued or the call replaced. (See affidavits of Marc Kondo, Michael Yanagita and Lily Tanabe at A.92, 98 and 101, respectively. See also A.271-272.)

The foregoing is sufficient to make out a "claim" under Section 3504, thereby requiring the government to affirm or deny electronic surveillance. The Court below so held:

"The affidavits submitted for the defendants were

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a motion to suppress evidence filed by a criminal defendant. Appellees did not file a motion to suppress pursuant to Section 2518(10)(a), but rather a motion for disclosure under Section 3504.

> certainly not demonstrative that their telephones were wiretapped: they sufficed in reporting a coincidence of telephone malfunction and reporting the possession by a government agent of information that could have been derived from telephone eavesdropping. Cf. In re Millow, 2d Cir. 1976, 529 F.2d 770, 774. The affidavits did not have to go further; the person whose telephone has been covertly tapped is inevitably hard put to demonstrate that that occurred which was designed to be indiscoverable." 418 F.Supp. at 218 (A.312).

Judge Dooling's opinion accurately reflects the law of this and other Courts of Appeal. E.g., In re Millow, 529 F.2d 770, 774 (2 Cir. 1976) ("the allegations of unlawful wiretapping sufficient to trigger the government's obligation to respond by affidavit or sworn testimony need only set forth a colorable claim..."); In re Quinn, 525 F.2d 222, 223-224 (1 Cir. 1975); In re Vielguth, 502 F.2d 1257 (9 Cir. 1974). We do not understand the government to seriously contest the finding of the District Court in this regard.

With respect to the government's obligation to respond to appellees' claim, its statement (Gb 20) that appellees sought an "exhaustive all-agency check" does not comport with the facts. Appellees' request was narrowly drawn and quite specific:

> "Mr. Reif: Based on what I have said now and the affidavits, what we are asking for, essentially, is for a determination as to whether or not there has been an electronic surveillance of either of the witnesses or of their home premises.
>
> We are not asking for a list of twenty premises and claiming they have standing to object.
>
> We are restricting it to the question of the witnesses and their home premises during the time in question of this case, which means the first

> date mentioned in the affidavit--I'm sorry--the indictment, which is July 28, 1975 or whenever the investigation began, to the present time. That's our request.
>
> We think that based on the obvious fact that a witness can never show conclusively on their own that they were the subject of an electronic surveillance, that the showing is sufficient to make the Government check with the appropriate agency and give us a response.
>
> I am not insistent that the Government check every agency in the federal government, but we feel it is appropriate to check, at the very least, the agencies involved with the case, of which there are three: the Bureau of Alcohol, Tobacco & Firearms, the Secret Service, and the FBI." (A. 181-182)(Emphasis added).

The Secret Service and the FBI played the major investigatory role in the underlying case prior to the arraignment of the Chins on October 6, 1975. It was the FBI in Los Angeles, where appellees reside (the Chins reside in Brooklyn, New York), which provided the initial investigative lead[14] and the Secret Service which procured and effected the warrant for the search of the Chins' premises,[15] which led to the seizure of the firearms involved in this case. The Chins were in fact arrested by the Secret Service.[16] Many of the public statements made by the government with respect to this case were made by the Secret Service or the FBI.[17] The District Court found both these agencies "had a role in the development of the investigation out of which the fire-

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14. This was freely stated to counsel by the government attorney prosecuting the Chins. See also April 11, 1976 Affidavit of James Reif, paragraphs 5,6,9 and 12, and Exhibits A,D and F thereto, originally submitted to the District Court and annexed as an Exhibit to June 22, 1976 Affidavit of James Reif submitted to this Court. See footnote 12 supra.
15. See April 11, 1976 Affidavit of James Reif, para.3,4,5,7 and Exhibits A,D and E thereto.
16. Id.
17. See April 11, 1976 Affidavit of James Reif, paragraphs 9-12 and Ex-

arms indictment grew." Supra at 218. See also id at 218-219. The government does not seriously contend to the contrary.

The government's response to appellees' claim consisted of an oral representation by AUSA Levin-Epstein to the effect that he knew of no electronic surveillance of Yanagita or Kondo. In this representation (which was unsworn but which Levin-Epstein offered to make under oath), the AUSA specifically noted he was not representing that there had been no government electronic surveillance of movants but only that based upon his own knowledge he knew of none.[18]

The second part of the government's response was an affidavit from Thomas R. Pattison, another Assistant U.S. Attorney in the Eastern District of New York. In addition to his assertion that he had no personal knowledge of electronic surveillance of Yanagita and Kondo (in effect the equivalent of Levin-Epstein's statement), Pattison stated only that the Bureau of Alcohol, Tobacco and Firearms had no record of surveillance on movants' respective home phone numbers.[19] Pattison also stated

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hibits D, E and F thereto.

18. "Mr. Levin-Epstein: I'm ready to say what I know and to my knowledge there has been no electronic surveillance anywhere in the case. When I say 'my knowledge,' the Court, I am sure, recognizes--

"The Court: Can you affirm as absolutely as you can that any of the testimony that you intend to solicit from Yanagita and Kondo were not the product of any electronic surveillance?

"Mr. Levin-Epstein: Yes, with this qualification: I am representing what I know, as an individual, and not what I know as part of the Government." (A.137-138).

19. In pertinent part, the affidavit read as follows: "In connection with the witnesses Kondo and Yanagita's motions relative to electronic surveillance, your deponent has been informed by Special Agent Edward Gervin of the Bureau of ATF, the investigating agency involved, that they

orally that the ATF Agent in charge of the case had no knowledge of electronic surveillance. There was no denial of electronic surveillance of Kondo or Yanagita individually; there was no denial of electronic surveillance of their respective home premises (only that their phones were not tapped); most significantly, there was no inquiry with either the Secret Service or the FBI, despite the fact both were admittedly actively involved in the investigation of the underlying case. Appellees respectfully submit this response was insufficient as a matter of law.

In In re Millow, 529 F.2d 770 (2 Cir. 1976), an immunized witness was held in contempt for refusal to testify before a federal grand jury. In reviewing Millow's contention that the government had failed to respond adequately to his claim of electronic surveillance, this Court, in a unanimous opinion (Judges Lumbard, Friendly and Mulligan), set forth two principles relevant here. First, this Court held that

> "the allegations of unlawful wiretapping required to trigger the government's obligation to respond by affidavit or sworn testimony need only set forth a colorable claim..." 529 F.2d at 774 (emphasis added).

Secondly, once this burden is met,

> "those government agencies closest to the investigation must scrupulously search their files and submit affidavits affirming or denying the validity of the aggrieved party's claim and indicating which agencies have been checked." Id. (emphasis ad-

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have no record of any electronic surveillance conducted on telephone numbers 213-732-4592 or 213-939-1423. This information was provided to your deponent on this date and was the result of communications with the National Headquarters of the Bureau of ATF. Moreover, your deponent has no knowledge from any source whatsoever that the witnesses Kondo or Yanagita were ever the subject of any electronic surveillance." (A.104).

ded).[20]

The Secret Service applied for and executed the search warrant which resulted in the seizure from the Chins of the guns which were the subject of their indictment and which were, according to the government, provided them by Yanagita and Kondo. The Secret Service arrested the Chins. The FBI office in the city where Yanagita and Kondo each live provided the investigative lead to the Secret Service in New York which directly resulted in the search of the Chins' premises and their arrest based upon seizure therefrom of the aforesaid weapons. It is plain the Secret Service and the FBI were actively involved in the investigation of the underlying case in which Yanagita and Kondo were called as witnesses. On these facts, Millow plainly mandated inquiry with these agencies.

The circumstances here bear a striking similarity to those in In re Quinn, 525 F.2d 222 (1 Cir. 1975), in which the Court of Appeals unanimously reversed a contempt judgment for refusal to testify before

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20. See also In re Grusse, 515 F.2d 157 (2 Cir. 1975) where this Court reviewed a civil contempt adjudication founded upon the failure of two witnesses to testify before the grand jury after being ordered to do so. Judge Lumbard noted that an affidavit from the AUSA, to the effect that based upon inquiry with "the appropriate federal agencies" he was stating there had been no surveillance of the witnesses or their premises, was "probably insufficient," id at 159, but that the deficiency had been cured by the supplemental oral testimony by the AUSA that the inquiry had been made with the FBI, the agency investigating the matter at hand. Judge Timbers, also in the majority, relied upon the opinion of the District Judge who, in upholding the sufficiency of the government's response, stated: "Here the Government has made a denial of wiretapping, based upon the report of the agency investigating the matter at hand. The denial covers the witnesses and names of attorney they furnished the Government. It covers the named persons and 'their premises.'" 402 F.Supp. 1232,1236 (D.Conn. 1974).

a grand jury, holding the government's response to the witness' claim of electronic surveillance was not legally sufficient. Quinn had stated in an affidavit that examination of the questions to be propounded indicated clearly they were based upon electronic surveillance, that one set of questions concerning legal fees could only have been derived from surveillance of a conversation he had had with an attorney. Subsequently, his attorney represented to the Court that Quinn had encountered extensive interference on his phone.

The government filed five separate affidavits, two of which are relevant here. In one, Deachman, the U.S. Attorney for the District, swore he was familiar both with the investigation and the proposed questions and that to his knowledge none of the questions were based upon electronic surveillance. In the second, Sawyer, a Special Agent of the Bureau of ATF, stated he was in charge of the investigation, had personally conducted a substantial portion of it and was familiar with the investigatory work of the other ATF Agents. He then denied there had been any electronic surveillance.

The First Circuit concluded these responses did not meet the Government's statutory obligation. Its reasoning is fully applicable here and we therefore quote the Court at length:

> "Although 18 U.S.C. Section 3504 speaks only of denying or affirming the allegedly illegal acts, courts have interpreted the statute to require the Government to make it reasonably clear that its denial is based on sufficient knowledge to be meaningful. See In re Alfred L. Hodges, Jr., 524 F.2d 568 (1 Cir. 1975). A balance must be struck between

accepting worthless responses, on the one hand, and, on the other, creating standards so refined and technical as to invite protracted interruption of grand jury proceedings. In general we shall expect the Government's denial to be amplified to the point of showing that those responding were in a position, by firsthand knowledge or through inquiry, reasonably to ascertain whether or not relevant illegal activities took place; but we shall not ordinarily require evidentiary hearings nor shall we require unrealistically perfect affidavits in connection with a Section 3504 response.

The present affidavits appear to us to go a considerable distance by meeting Quinn's specific charges and presenting informed denials by those directly concerned with the Quinn investigation. But we find them deficient in one respect. They leave open the possibility that the Quinn inquiry is based, in some part, on information or leads furnished by other agencies about whose sources and activities neither Mr. Deachman nor Mr. Sawyer may know. Both men deny knowledge of any electronic surveillance, but they would not necessarily know the means used by other federal agencies to gather the information, if any, that was furnished to their respective staffs for use in the Quinn investigation.

In some cases, this possibility might seem remote. But the instant investigation involves activities... which could reasonably have engaged the attention of agencies other than the Bureau of Alcohol, Tobacco and Firearms and the local United States Attorney; and such other agencies might to some degree have fueled the present inquiry. Indeed, the Assistant United States Attorney handling the case was not from New Hampshire but was specially assigned from the Department of Justice in Washington.

We think, therefore, that for the Section 3504 response to be adequate in this case, there must be included an explicit assurance indicating that all agencies providing information relevant to the inquiry were canvassed." 525 F.2d at 225-226 (emphasis added, citations omitted).

The instant case is on all fours with Quinn; indeed we need not speculate whether the activities in question "could reasonably have en-

gaged the attention of agencies other than" the Bureau of ATF, id at 225, or whether "such other agencies might to some degree have fueled the present inquiry," id at 226, for we know, based upon news accounts and documents on record in the Chin case, that both the Secret Service and the FBI were actively involved in the government's investigation here. On these facts, Quinn requires that there be an "explicit assurance" that the Secret Service and the FBI were inquired of to determine whether either had conducted electronic surveillance to which Yanagita or Kondo might object.

Santangelo v. People, 49 A.D.2d 220, 374 NYS2d 107, rev'd on other grounds, 38 NY2d 536, 381 NYS2d 472 (1976), is also strongly supportive of appellees' contention. There, a state grand jury witness demanded the state disclose whether or not it had conducted electronic surveillance. The State's attorney declined to make inquiry with the federal agencies. On appeal, the Appellate Division reversed, holding that because of the federal government's acknowledged role in the investigation, the prosecutor was obliged to make a good faith inquiry of federal law enforcement agencies to determine whether Santangelo had been surveilled. 374 NYS2d at 110-111. If a prosecutor must make inquiry regarding surveillance of a witness with the relevant agencies of a separate governmental jurisdiction, it follows a fortiori he should be obliged to make due inquiry with agencies within the same government which are actively involved in the investigation.

The government's final contention, that its response need only consist of a denial by the U.S. Attorney prosecuting the case (Gb 20), has been thoroughly repudiated--by experience as well as by judicial opinion. The U.S. Attorney obviously does not conduct the electronic surveillance nor does he keep records thereof. Accordingly, he is dependent upon other sources for his information in this regard. A denial of electronic surveillance made by him without inquiry with the agencies actually involved in the investigation of the case is simply worthless. As the First Circuit has noted in rejecting exactly such a denial: "A denial of knowledge of illegal wiretapping is obviously worth nothing if the affiant was in a position to know nothing." In re Quinn, 525 F.2d at 225, n.5. See also U.S. v. Vielguth, 502 F.2d 1257, 1261 (9 Cir. 1974)(Chambers, J., dissenting).

Indeed, cases are legion in which the U.S. Attorney prosecuting a case or interrogating a witness has denied under oath, presumably in good faith, that the person involved was overheard by electronic surveillance where that statement proved to be false or where the U.S. Attorney was otherwise unaware of such surveillance. In Black v. U.S., 385 U.S. 26 (1966) and O'Brien v. U.S., 386 U.S. 345 (1967), for example, unknown to the government's trial attorneys, the defendants therein had been overheard by electronic surveillance, a fact which was not disclosed until after the cases had reached the U.S. Supreme Court years later. The Court held that new trials were required in each case. See also Schipani v. U.S., 385 U.S. 372 (1966) and U.S. v. Schipani, 289

F.Supp. 43 (EDNY 1968), a similar case arising in this Circuit.

In In re Tierney, 465 F.2d 806 (5 Cir. 1972), the government denied under oath in the District Court that it had conducted electronic surveillance of grand jury witnesses or their attorneys. On appeal of the contempt judgments, the government was forced to retract its sworn denial, as it had discovered in the interim that an attorney for the witnesses had in fact been overheard. Id. at 813.

In Smilow v. U.S., 472 F.2d 1193 (2 Cir. 1973), the government had denied surveillance of a grand jury witness and on that premise this Court had affirmed. 465 F.2d 802. On certiorari, however, the Solicitor General confessed the government's earlier denial was incorrect, thus necessitating a remand to the Court of Appeals. 409 U.S. 944. In remanding to the District Court for further proceedings, this Court, in a unanimous opinion by Judge Feinberg, joined by Judges Mulligan and Oakes voiced its dissatisfaction with the government's misinformation and identified the difficulty with inadequate initial government inquiries regarding electronic surveillance:

> "In view of the history of this case, we cannot forbear expressing our regret that those representing the Government in court were unable, until such a late date, to discover the true state of affairs with regard to official wiretapping of the witness' telephone conversations...If government agencies are going to employ such surveillance techniques, responsibility for accurate description to the courts of the results of these efforts rests with those who make the report. 18 U.S.C. Section 3504. Although in this case a second check of the records elicited a concession of possible error, the liti-

> gants, their counsel and the courts wasted a considerable amount of time working under great pressure because of the original misinformation. In addition, Smilow was in jail for a good portion of that period. We trust that in the future the Government will be more thorough in the investigation of such matters." 472 F.2d at 1195.

In the instant case the government was not thorough in its inquiry: it refused to make due inquiry of two federal agencies directly involved in the underlying case, even after the AUSA's attention was specifically drawn to them by appellees' counsel. This failure renders its response insufficient as a matter of law. In re Millow, supra; In re Quinn, supra.[21]

The government's affidavit is inadequate for a further reason: it fails to unequivocally deny surveillance of Yanagita or Kondo. Examination of its wording shows a denial of tapping of the home phones of each of them. This would not preclude the possibility of the government's overhearing conversations between Yanagita or Kondo and one of the Chins through tapping of the Chins' telephone or through bugging the premises of either. The government's reply to claims of electronic

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21. Contrary to the government's intimation (Gb 20), its claim that the search of the Chins' apartment "revealed" (we assume the government means led to the disclosure of) New York City Firearms forms with appellees' names on them hardly proves the questions to be asked them at trial were not derived from illegal electronic surveillance since, for example, it in no way establishes that the sources of the information included in the government's application for the search warrant for the Chins' premises were not derived from electronic surveillance of appellees. In this regard we would note two facts: the warrant was admittedly based upon a tip provided by the FBI office in Los Angeles, at a time when appellees resided and were present in that city. Second, the government's affidavit in support of its application for the warrant relies upon a "confidiential informant" as a source of the information contained there-

surveillance must be responsive to the particular claims made. See, e.g., Beverly v. U.S., 468 F.2d 732 (5 Cir. 1972)(reversing contempt judgments founded upon refusals to testify before a federal grand jury based upon the government's having denied some but not all of the particular claims of surveillance). In response to a claim of electronic surveillance of a witness, it is not enough to deny surveillance over one phone when the relevant conversations of the witness might well have been overheard through tapping of the phone of the person to whom he was talking or though bugging of the premises. The government's response must be full and unequivocal. Beverly v. U.S., supra. Such was not the case here.

Concluding Statement

The government has repeatedly talked about "delay" and "disruption." We fail to understand the relevance of this language to the case at hand. The government made proper inquiry with the Bureau of ATF in less than a day: the Pattison affidavit denying surveillance on the basis of this inquiry was submitted in the afternoon of the very first day of trial. We are offered no explanation why local government attorneys could not telephone three agencies instead of one. The government did not rest its case until the third day of trial so that even, hypothetically, if the response from the Secret Service or the FBI had taken a day or so longer, no delay whatsoever in the trial

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on. It is common knowledge the government frequently uses the term "confidential informant" as a euphemism for electronic surveillance!

would have resulted, much less a "protracted interruption" thereof.[22] In re Quinn, supra at 225.

The government's brief reflects an indifference of, if not disregard for, the important concerns underlying the enactment of Title III of the Omnibus Crime Control And Safe Streets Act of 1968 and 18 U.S.C. Sections 2515 and 3504 in particular. These concerns were reviewed in detail by the U.S. Supreme Court in Gelbard v. U.S., 408 U.S. 41, 47-52 (1972). For example, the Court noted that "the protection of privacy was an overriding congressional concern." Id at 48.

> "Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of §2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance:
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> 'In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.' §801(b), 82 Stat. 211 (emphasis added).
>
> And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means of §2515, of the limitations upon invasions of individual privacy:

22. Compare the one week adjournment of an important trial in U.S. v. Huss, 482 F.2d 38, 40-41 (2 Cir. 1973) to permit the government to determine whether a federal agency had engaged in electronic surveillance resulting in an overhearing of a trial witness.

'Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited....Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.' S.Rep.No. 1097, supra, at 69 (emphasis added).

Section 2515 is thus central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear. The purposes of §2515 and Title III as a whole would be subverted were the plain command of §2515 ignored when the victim of an illegal interception is called as a witness...and asked questions based upon that interception. Moreover, §2515 serves not only to protect the privacy of communications but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a ...witness, on pain of imprisonment, to disclose evidence that §2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents." 408 U.S. at 49-51 (footnotes omitted).

Section 3504 is theprocedural mechanism designed to effectuate Section 2515. It reflects the Congressional understanding that, in the words of the District Court, "the person whose telephone has been covertly tapped is inevitably hard put to demonstrate that that occurred

which was designed to be indiscoverable." 418 F.Supp. at 218. Accordingly, once a proper claim has been made, Section 3504 places upon the government, the party in possession of all the facts, the responsibility to come forward with them.

It may be that in a given case effectuation of Sections 2515 and 3504 may result in some lengthening of a trial or other proceeding. But protection of federal rights often lengthens proceedings. Having guilt or innocence determined by a jury rather than a judge inevitably lengthens a trial, for example. "Delay" is not some talismanic incantation before which all rights must fall; to the contrary, it must be subordinated to more fundamental concerns reflected in the judgment of the authors of the Constitution or of the Legislative branch of government. The statutes under which appellees' claim is made are intended to protect witnesses, among others, from invasions of privacy and to protect the Courts from become unwitting accomplices to violations of the law. These statutory provisions must be construed so as to vindicate these congressional concerns. Indeed, in the final analysis, experience has shown, as for example in the Smilow case in this Court, see supra, that it is the failure of the government to take these concerns seriously which in fact "delays" or "disrupts" proceedings, rather than efforts to vindicate these congressional

concerns.[23]

23. It should be noted it is virtually inconceivable that requiring the government to make due inquiry of two federal agencies regarding electronic surveillance of two witnesses could occasion "protracted interruption", Quinn, op.cit., of a trial. Each federal agency engaging in electronic surveillance keeps a master file (called an "elsur index") of its surveillance. The index is alphabetized according to the names of persons overheard. Thus in order to determine whether Yanagita or Kondo had been overheard through surveillance conducted by, for example, the Secret Service, the government need only check the alphabetized index kept by that agency and see whether either is listed therein. As Judge Newman noted of this inquiry: "It is hard to understand why the task...could possibly entail more than one hour's work by a file clerk." In re Turgeon, 402 F.Supp. 1239, 1242 (D.Conn. 1975).

II. THE TRIAL JUDGE WAS WITHOUT AUTHORITY TO ORDER APPELLEE KONDO TO GIVE SELF-INCRIMINATING TESTIMONY ON THE BASIS OF A GOVERMENT APPLICATION FOR SUCH AN ORDER WHICH WAS APPROVED BY A SECOND RANKING DEPUTY ASSISTANT ATTORNEY AS ACTING ASSISTANT ATTORNEY GENERAL.

A. THE ATTORNEY GENERAL LACKS STATUTORY AUTHORITY TO DELEGATE THE POWER TO APPROVE APPLICATIONS FOR COMPULSORY TESTIMONY ORDERS TO A SECOND RANKING DEPUTY ASSISTANT ATTORNEY GENERAL AS ACTING ASSISTANT ATTORNEY GENERAL .

Appellee Kondo properly declined to testify at the Chin trial on the ground that answering the questions posed would tend to incriminate him and that he was therefore privileged from giving testimony pursuant to the Fifth Amendment. Cf. Hoffman v. U.S., 341 U.S. 479, 486-487 (1951). In such circumstances, appellee's testimony could nevertheless be compelled, but only by affording him immunity coextensive with the protection afforded him by the Fifth Amendment. Kastigar v. U.S., 406 U.S. 441, 449 (1972).

However, there is no inherent judicial authority to confer immunity, that is, no authority for a court to confer immunity sua sponte. A Court may compel self-incriminating testimony only pursuant to and in conformity with authority conferred by statute. U.S. v. Gorham, 523 F.2d 1088, 1096 (D.C.Cir. 1975); Earl v. U.S., 361 F.2d 531, 534-535 (D.C.Cir. 1966) (Burger, J.); Issacs v. U.S., 256 F.2d 654, 661 (8 Cir. 1958).

In the instant case, the government sought to compel appellees to testify pursuant to 18 U.S.C. Sections 6002-6003. The Assistant U.S.

Attorney made an oral application for an order compelling appellee Kondo's testimony on the basis of a letter from one Robert Keuch, the second Deputy Assistant Attorney General who was Acting Assistant Attorney-General, purporting to approve the government's application. (A.110).[24]

Section 6003(a), under which the government proceeded, provides that a District Court shall issue an order requiring a witness to give self-incriminating testimony upon a request of the U.S. Attorney which is made "in accordance with subsection (b) of this section." Section 6003(b) provides in pertinent part that the government may request an order under subsection (a) only

> "with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General . . ."

The designation contemplated by Section 6003(b) is accomplished by 28 C.F.R. Section 0.175(a):

> "The Assistant Attorney General in charge of the Criminal Division is authorized to exercise the authority vested in the Attorney General by sections 2514 and 6003 of Title 18, United States Code, to approve the application of a U.S. attorney to a federal court for an order compelling testimony . . . by a witness in any proceeding before . . . a court of the United States, . . . when the subject matter of the case or proceeding is within the cognizance of the Criminal division . . ."

The government's application for an order compelling Kondo to testity was not made by the Attorney General (Edward H. Levi), the Deputy Attorney General (Harold R. Tyler Jr.) or the Assistant Attorney General designated

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[24] See pages 15-16 of the Government's brief in the District Court. (A.130-131).

by the Attorney General to approve such an application, that is, the Assistant A.G. in charge of the Criminal Division of the Justice Department (Richard L. Thornburgh). It is submitted, as the District Court held, 418 F. Supp. at 219-220, that the application was therefore unauthorized as a matter of law and that the trial judge therefore lacked authority to enter an order requiring Kondo to testify.[25]

In the years preceding passage of 18 U.S.C. Sections 6002-6003, Congress enacted numerous other compulsory testimony statutes which provided that testimony could be compelled "upon the approval of the Attorney General" and made no reference to Deputy Attorney General or other subordinates. See, e.g., 18 U.S.C. Section 2514 (1968); 18 U.S.C. Section 1406 (1956) and 18 U.S.C. Section 3486 (1954). Under these provisions, 28 U.S.C. Section 510, which authorizes delegation by the Attorney-General of any of his functions to any subordinate,[26] was applicable, and the government could properly make application for an immunity order upon the approval of an officer designated by the Attorney General to give such approval. See, e.g., In re December 1968 Grand Jury v. U.S., 420 F. 2d 1201, 1203 (7 Cir.), cert. den. 397 U.S. 1021 (1970); U.S. v. DiMauro, 441 F. 2d 428, 438-439 (8 Cir. 1971).

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25 The issue presented here appears to be one of first impression at the appellate level, although this Court has previously alluded to the question. In re DiBella, 499 F. 2d. 1175, 1177, n. 3 (2 Cir. 1974), cert. den. 419 U.S. 1032.

26 Section 510 provides: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

In 1970, Congress enacted a new statute providing for the compulsion of self-incriminating testimony from a witness in federal proceedings. Section 6003, however, contained language which differed markedly from its predecessors: as noted, the government's application could be made only "with the approval of the Attorney-General, the Deputy Attorney General on any designated Assistant Attorney General." In view of the difference between the language consistently utilized by Congress in the predecessor statutes and the language of the 1970 act, language apparently employed for the first time in a compulsory testimony provision, it can only be concluded Congress intended to alter the scope of those who might properly approve a government application for immunity. In particular, unless the new and different language be deemed wholly inconsequential, a result plainly inconsistent with logic and the canons of statutory construction, it can only be concluded Congress intended to limit the power of the Attorney General to delegate the responsibility to approve compulsory testimony applications to those officials specifically identified in Section 6003(b).[27]

This conclusion is supported by the opinion in U.S. v. Giordano, 416 U.S. 505 (1974), in which the U.S. Supreme Court reviewed the validity of a government application for a wiretap order authorized by the Executive Assistant to the Attorney General of the United States. Title 18 U.S.C. Section 2516(1) specifies such an application must be made with the

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[27] As proof Congress had not forgotten about the general power of delegation existing under 28 U.S.C. Section 510 in the same period it was enacting Sections 6002-6003, see, in addition to 18 U.S.C. 2514, the Juvenile Justice and Delinquency Prevention Act of 1974, 18 U.S.C. Section 5032. Cf. U.S. v. Cuomo, 525 F. 2d 1285, 1287-1288 (5 Cir. 1976.)

authorization of "the Attorney-General, or any Assistant Attorney-General specially designated by the Attorney-General."

The government argued the Attorney-General had the power under 28 U.S.C. Section 510 (See footnote 25) to authorize other individuals, such as the Executive Assistant, to approve such applications. 416 U.S. at 513. The Supreme Court unanimously rejected this argument in language applicable here:

> "As a general proposition, the argument is unexceptionable. But here the matter of delegation is expressly addressed by Section 2516, and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General.' Despite Section 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. . . . [W]e think Section 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." Id at 514.

In other words, despite Section 510, Congress may exercise its right to specifically limit those to whom the Attorney General may delegate a particular responsibility. Where "the matter of delegation is expressly addressed" by the statute, op.cit., the power of delegation is thereby limited to those persons specifically identified in the statute.[28]

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[28] At least two courts have held that an Acting Assistant Attorney General may not properly approve an application under Section 2516. U.S. v. Acon, 513 F. 2d 513 (3 Cir. 1975); U.S. v. Boone, 348 F. Supp. 168 (E.D. Va. 1972), rev'd on other grounds 499 F. 2d 551 (4 Cir. 1974). In Acon, the Third Circuit noted: "Congress has created a very narrow and specific authorization power. An acting assistant attorney general is not mentioned in the statute." 513 F. 2d at 516.

The same considerations impel the conclusion that an application for an order compelling self-incriminating testimony cannot properly be made by an Acting Assistant Attorney General. In Section 6003(b), as in Section 2516(1), the "matter of delegation is expressly addressed." Giordano, op.cit. The statute specifies only the Attorney General, the Deputy Attorney General or a designated Assistant Attorney General may authorize an application for an order compelling testimony. It does not provide that such authority may be exercised by an Acting Assistant Attorney General or any other official.

In F.T.C. v. Foucha, 356 F. Supp. 21 (N. D. Ala. 1973), the Court found that because Section 6003(b) specifically designated officials who could authorize an application for an order compelling testimony, its provisions were to be read as a limitation upon Section 510 and that an official not named in the statute could not be delegated the power to authorize an application for such an order. In Foucha, the question of who could authorize an application for an order compelling testimony under Section 6004 was examined. That section specifies the procedure by which an administrative agency may apply for an order compelling testimony and provides that an order may be requested "with the approval of the Attorney General." Unlike Section 6003(b), Section 6004 does not designate any other officials who can approve an application for an order compelling testimony.

The government contended 28U.S.C. Section 510 empowered the Attorney General to delegate the responsibility to approve an application for an order compelling testimony to other officials. In upholding the

government's contention, the Court contrasted the Attorney General's power to designate other officials to authorize applications under Section 6004 with his power to do so under Section 6003, and found the Attorney General could designate other officials to approve an application under Section 6004, but not under Section 6003:

> "Three explanations can be given for the difference in language. First, the difference may have been inadvertent, indicating no conscious differentiation by Congress in the two sections. Second, Congress may have intended that only the Attorney General personally could give approval under Section 6004, while other high level members of his office could have authority to give approval under Section 6003. Third, Congress may have intended that only specified high level members of his office could have authority to give approval under Section 6003, while leaving the Attorney General with respect to Section 6004 with a broader power of delegation under existing 28 U.S.C. Section 510.
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> * * *
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> I conclude that the third explanation should be adopted--that Congress, by failing to specify in Section 6004 (as it had in Section 6003) additional persons in the Attorney General's office who could grant approvals, intended to give the Attorney General the broader range of authority to delegate existing under 28 U.S.C. Section 510 . . . [U]se of additional words such as found in Section 6003 has been held to indicate a limitation upon the power to delegate." 356 F. Supp. at 23-24.

The Working Papers of the National Commission on Reform of Federal Criminal Laws cited by the government lend further support to appellee's submission. Most of the language quoted therefrom by the government goes to the issue of whether the Attorney General's power to approve applications for compulsory testimony orders should be delegable at all, a point not in issue here. The Commission did, however, address the

question to whom should this power be delegable. (The government omitted from its quotation much of the relevant language.) The Commission first noted the proposed statute expressly authorized delegation to the Deputy Attorney General or an Assistant General. (P. 1436). Contrasting this with a statute which specified the Attorney General and made no other reference, the Commission noted:

> "If Congress left the Attorney General approval power unqualified, the result might be to create total delegability. It may be noted that 28 U.S.C. Section 510 creates a broad Attorney General delegation provision . . . [quotation of Section 510 omitted]. There seems to be no reason why this language would not apply to create delegability automatically regarding an immunity approval function specified by statute to be exercised by the 'Attorney General.'" (P. 1437).

The Commission noted that precisely to avoid this possibility:

> "The draft statute limits delegability by retaining the approval function at a high level and authorizing delegation only to the Deputy Attorney General or an Assistant Attorney General. Id (emphasis added).

The Commission observed the statute was so drawn to prevent "overly broad subdelegations by the Attorney General."

Thus, the Working Papers of the Commission, whose recommendations the Government admits provided the basis for Section 6003,[29] make clear the intent to limit the applicability of Section 510 and to limit the authority of the Attorney General to delegate his power to approve compulsory testimony applications to the Deputy Attorney General and Assistant

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[29] See Gb 22, fn. 7.

Attorneys General only.[30]

Centralization of the power to authorize compulsory testimony applications in those identified in Section 6003(b) serves at least two salutory interests. Despite a grant of immunity a witness may prefer not to testify. "This may be due to his desire to avoid '[t]he essential and inherent cruelty of self-accusation, the odium attached to a confession of guilt or the imposition of civil or economic disabilities which the grant of immunity does not erase."[31] While these are not interests of constitutional dimension,[32] this Court has recognized they are of Congressional concern in the enactment of compulsory testimony legislation. In re Vericker, 446 F.2d 244, 247 (2 Cir. 1971). They are therefore properly to be considered by the official who is to approve or disapprove the government's application for an order compelling testimony.

Once a witness testifies pursuant to Sections 6002-3, there is an "affirmative duty" upon the government to demonstrate that any subsequent prosecution of the witness is based upon evidence "derived from a legitimate source wholly independent of the compelled testimony." Kastigar v.

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30 The asserted volume of immunity requests, Gb 24, was explicitly taken into account in determining precisely to whom the power to approve applications should be delegable. See Working Papers, p. 143f quoted at Gb 27. A court may not override the weight ascribed to it by Congress.

31 Reif, "The Grand Jury Witness and Compulsory Testimony Legislation." 10 American Crim. L. Rev. 829, 845 (1972).

32 Compare the majority opinion in Brown v. Walker, 161 U.S. 591 (1896) with the dissenting opinion of Justice Field.

U.S., 406 U.S. 441 (1972). Experience has shown this burden to be complicated and difficult to meet. E.g., U.S. v. Kurzer, 534 F.2d 511 (2 Cir. 1976); U.S. v. McDaniel, 482 F.2d 305 (8 Cir. 1973); U.S. v. Dornau, 359 F.Supp. 684 (SDNY, 1973), rev'd. on other grounds 491 F.2d 473 (2 Cir. 1974).[33] Accordingly, a delicate judgment may have to be made, balancing the need for testimony in a current prosecution against the difficulty of succeeding in a future one.[34]

Centralizing authority for approving applications for compulsory testimony orders in the Attorney General, the Deputy Attorney General and the designated Assistant Attorneys General maximizes assurance that

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[33] In at least one case, the "Watergate" related prosecution of former White House aide Gordon Strachan, the government reluctantly concluded it had to dismiss the prosecution since it could not meet its burden of showing its case was derived from sources wholly independent of Strachan's Senate testimony.

[34] Moreover, a judgment must be made balancing the importance of obtaining the compelled testimony against its likely reliability. This has been acknowledged by the present Attorney General. In "Levi Calls Broad Distrust of Law System A Problem," L.A. Times, Feb. 4, 1975, p. 4, it was reported:

> "Levi's harshest criticism was reserved for the increased use of immunity by prosecutors, a trend about which his predecessor, William B. Saxbe, often voiced concern.
>
> Levi termed immunity 'glorified use of the informer (that) carries with it all the temptations of the informer.'
>
> While stressing, "I don't know what the solution is,' Levi said: 'This is something that has to be looked at.' He said the examination should include not just whether immunity was being misused in a particular case, but whether immunity carried with it longterm protection. In any case, he said, immunity 'is a very dangerous instrument.'"

both these interests will be meaningfully considered in a given case. The witness' interest in avoiding the inherent cruelty of self-accusation, the odium attached to a confession of criminal conduct and the collateral disabilities not erased by a grant of immunity can properly be weighed against the government's need for the testimony by a person experienced in making these evaluations. The determination whether to risk dismissal of a future prosecution in order to obtain testimony for a current one and to otherwise balance the need for testimony against the potential social cost and abuse is likewise a judgment which would be entrusted to a person normally experienced in making such determinations who is "in a position to know the full law enforcement ramifications of a particular immunity grant."[35] These concerns can best be satisfied by interpreting Section 6003(b) as it reads, as permitting authorization only by the Attorney General, the Deputy Attorney General or an Assistant Attorney General.

Since the government's application was not so authorized, it was invalid and an order compelling Kondo's testimony should not have been entered.

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35 The Commission cited this as one concern in its recommendations regarding delegability. See Working Papers, p. 1436. With all respect to Mr. Keuch, there is no indication that as, in effect, an assistant to an assistant to the Assistant Attorney General, he was such a person.

B. THE ATTORNEY GENERAL DID NOT PURPORT TO AUTHORIZE REDELEGATION OF HIS AUTHORITY TO APPROVE APPLICATIONS FOR COMPULSORY TESTIMONY ORDERS TO A SECOND RANKING DEPUTY ASSISTANT ATTORNEY GENERAL AS ACTING ASSISTANT ATTORNEY GENERAL.

There is a second and independent reason, alluded to by the District Court, see 418 F. Supp. at 219 - 220, why the government's application for an order requiring appellee Kondo to give self-incriminating testimony was not properly authorized.

The Government has acknowledged the person who approved said application was not the senior or first Deputy of the Assistant Attorney General in charge of the Criminal Division.[36] Title 28 C.F.R. Section 0.178 (a) provides:

> "The Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney Generals designated in Section 0.175 (b) are authorized to redelegate the authority delegated by this subpart to their respective Deputy Assistant Attorney Generals to be exercised solely during the absence of such Assistant Attorney Generals from the City of Washington."

Assuming arguendo the Attorney General possessed statutory authority to issue this order, but see POINT II A supra, Section 0.178 (a) is a limitation upon the general power of redelegation authorized by 28 C.F.R. Section 0.133[37] and as such, is binding upon the Department of Justice.

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[36]The first Deputy was John C. Keeney. Robert Keuch, who approved the Kondo application was the next Deputy below Mr. Keeney. See Governement's brief in District Court, p. 16 (A.131).

[37]Section 0.178 (a) should be read as a limitation upon the general power of redelegation authorized by Section 0.133 in the same way 18 U.S.C. Section 6003 (b) is a limitation upon the general power of delegation conferred by 28 U.S.C. Section 510. See POINT II A supra.

E.g., Yellin v. U.S., 374 U.S. 109 (1963); Service v. Dulles, 354 U.S. 363, 372 - 373 (1957); Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

While Section 0.178 (a) is ambiguous, see 418 F. Supp. at 219, it appears the plural contained therein refers to the senior Deputy of each of the Assistants named in the section. Noting "the statutory duty to obtain an approval from an officer of defined senior responsibility, id., the District Court discounted the alternative interpretation, to wit, that Section 0.178 (a) authorizes redelegation to any deputy of any Assistant A.G.: "It must be doubted that so loose a procedure comports with the Congressional purpose." Id at 219 - 220.

The District Court's conclusion is supported by a comparison of Section 0.178 (a) with 23 C.F.R. Section 0.132 (d) which, in the event of a vacancy in the position of head of the Criminal Division, for example, authorizes the performance of said head's functions by "the ranking deputy (or his equivalent) in such unit who is available." See also Section 0.133 for comparable language. This language contemplates that, in the event of a vacancy, if the first Deputy to the ex-Assistant A.G. is not available, the next ranking deputy shall perform the functions of that Assistant A.G. By contrast, Section 0.178 (a) does not speak in terms of the ranking deputy who is available but specifically of the Deputy Assistant Attorney Generals. In view of this contrast, it is a logical and proper conclusion that, by Section 0.178 (a), the Attorney General did not purport to permit redelegation of his power to approve compulsory testimony applications to the highest ranking Deputy Assistant A.G. who may be available but only to the senior Deputy to the Assistant A.G.

III. THE FIFTH AMENDMENT PROTECTED APPELLEES AGAINST HAVING TO GIVE TESTIMONY SELF-INCRIMINATING UNDER THE LAWS OF JAPAN WHERE THERE WAS A REALISTIC POSSIBILITY THEIR TESTIMONY WOULD BE USED AGAINST THEM IN A JAPANESE PROSECUTION AND WHERE THE IMMUNITY GRANTED THEM DID AND COULD NOT PREVENT SUCH USE OF SELF-INCRIMINATING TESTIMONY.

It is submitted that Yanagita and Kondo properly asserted the Fifth Amendment privilege against self-incrimination after being granted immunity pursuant to 18 U.S.C. Sections 6002-3 and could not therefore be ordered to testify because (A) Yanagita and Kondo's testimony would have tended to incriminate each under the laws of Japan; (B) there was a realistic possibility each' trial testimony could be used against him in a Japanese prosecution under such laws; and (C) the Fifth Amendment privilege against self-incrimination protected Yanagita and Kondo from having to testify in such circumstances. Accordingly, the order dismissing the informations against appellees should be affirmed on this ground as well.

A. THE TESTIMONY OF EACH APPELLEE WOULD HAVE TENDED TO INCRIMINATE HIM UNDER THE LAWS OF JAPAN.

At the Chin trial, the Assistant U.S. Attorney sought to question both Yanagita and Kondo about guns which were the subject of the indictment therein. (A. 189-203) Counsel had previously been informed by the AUSA the government would seek to prove through their testimony that each of them sold or gave to the defendants one or more such firearms.[38]

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[38]At the trial, the government introduced into evidence two "disposition notices" from the City of New York Firearms Control Board allegedly bearing appellee Yanagita's signature. These notices listed Yanagita as the seller of two guns, an AR-7, Serial No. 29474 and an M-1, Serial No. 5487136, to Kenneth Chin. Also introduced by the government was a "firearms transaction record" from the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms which listed Kondo as the purchaser of a AR-180 rifle, Serial No. S-12590 from Coles Sporting Goods, a gun store in California, on August 8, 1975. Each of these firearms was a subject of the indictment. See [illegible]2, fn. 1 and 2.

In Hoffman v. U.S., 341 U.S. 479 (1951), the Supreme Court set forth the test for determining whether the answers to questions asked a witness would tend to incriminate that witness (and whether therefore the witness would have the right to decline to testify):

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Id at 486-7 (emphasis added.)

In order to overrule a claim of privilege, it must be

> "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." Id at 488 (emphasis in original).

See also Malloy v. Hogan, 378 U.S. 1, 11-12 (1964). The Hoffman Court further held:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman, supra at 486.

The privilege may be asserted if answers to the questions would "supply investigatory leads to a criminal prosecution." Albertson v. SACB, 382 U.S. 70,78 (1965). In summing up Hoffman and its progeny, the Third Circuit, in language quoted with approval by the Supreme Court, Emspak v. U.S., 349 U.S. 190,198, n. 18 (1955), held as follows:

> "It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case . . .
>
> Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical. . ." U.S. v. Coffey, 198 F2d 438, 440 (3 Cir. 1952).

The government consistently contended the Chins were planning to assassinate Emperor Hirohito of Japan during his visit to New York City in October, 1975; and that the weapons seized in their apartment (which were allegedly provided them by appellees) were to be used for this purpose. On October 3, 1975 a search warrant was issued for the premises of the Chin apartment upon application of the Secret Service made pursuant to 18 U.S.C. Section 3056, which authorizes the Secret Service to "protect the person of a visiting head of a foreign state or foreign government." Two supporting affidavits were submitted by Neal Findley, Special Agent of the Secret Service. In the "Supplemental Affidavit," Findley stated explicitly:

> "This Supplemental Affidavit is submitted in connection with and in support of an application for a search warrant for the above-described premises. A search warrant is sought in connection with an investigation surrounding the official visit of Emperor Hirohito of Japan to the United States and, more particularly, to the City of New York which is currently scheduled to take place between the 4th day of October 1975 and the 7th day of October 1975."

He further stated:

> "It is the opinion of the undersigned and of the United States Secret Service that the existence of the firearm described in your deponent's affidavit in support of this search warrant and the involvement of the above-mentioned individuals poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States. Accordingly, pursuant to Title 18 of the United States Code, Section 3056 and the authorization to protect the person of a visiting head of a foreign government as embodied therein, the foregoing information is provided . . ."

In many newspaper articles which appeared in the New York press after the Chins' arrest, the Secret Service and the U.S. Attorney's Office reinterated the government's belief the weapons seized in the search were to be used to assassinate Emperor Hirohito. In an article in the Daily News on October 5, 1975, it was reported that Charles Whitaker, Special Agent

in charge of the Secret Service's New York office, stated the raid was the result of his agency's duties as the protection agency for the President and certain foreign leaders. In the same article, Raymond Dearle, an assistant U.S. Attorney, is quoted as saying "the Secret Service was definitely of the opinion that there might be a connection between the visit of Emperor Hirohito and the purchase in California last July of an automatic weapon which they had information was in this apartment in Brooklyn." The article also stated the New York City police maintained the raid was the direct result of a tip about a plot to kill the Emperor.

On October 6, 1975, an article appeared in the New York Times concerning the Chins stating the Secret Service believed the weapons seized might have been intended for use in an assassination attempt on Emperor Hirohito. A New York Times Article on October 7, 1975 reported Charles Whittaker said his office searched the suspects' apartment because it had received leads from the FBI regarding a possible threat by the two suspects to persons under the protection of the Secret Service.[39]

Testimony that one supplied firearms allegedly to be used in an attempt to assassinate the Emperor of Japan would, at the least, supply an investigatory lead to a criminal prosecution under Japanese law. Albertson v. SACB, op. cit. The Japenese Penal Code provides as follows:

> "Article 77. A person who commits an insurrectionary or seditious act with the object of overthrowing the government, seizing the territory of the state, or otherwise subverting the national constitution shall be guilty of the crime of civil war and punished subject to the following distinctions:
> (1) A ring leader shall be punished with death or imprisonment for life.

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[39]The Findley Supplemental Affidavit and newspaper articles are exhibits to June 22 Affidavit of James Reif (fns.12 and 14). The articles may properly be used to establish the setting in which questions are asked. Hoffman v. U.S., supra.

(2) A person who participates in a plot or holds a command in the mob, with imprisonment for life or not less than three years; a person who engages in various other functions, with imprisonment for not less than one year nor more than ten years.
(3) A person who merely joins in the insurrectionary or seditious act, with imprisonment for not more than three years.

2. An attempt of the crime mentioned in the preceding paragraph shall be punished, except in the case of persons mentioned in item (3) of the preceding paragraph.

Article 78. A person who prepares or conspires civil war shall be punished with imprisonment for not less than one year nor more than ten years."

Most importantly for present purposes, the Japanese Code further provides:

"Article 79. A person who aids and assists the commission of a crime under the preceding two Articles by furnishing arms, money or provisions, or by other acts, shall be punished with imprisonment for not more than seven years." (Emphasis added)[40]

Article 2 of the Penal Code provides that certain acts are prosecutable under Japanese law even if committed outside the territory of Japan by a person not a Japanese national. Among the acts enumerated therein are those which would be crimes under Articles 77-79 supra. The pertinent part of Article 2 is:

"This code shall apply to every person who commits any of the following crimes outside the territory of Japan:

* * * * *

(2) Crimes specified in Article 77 to 79 inclusive."[41]

Thus an act committed by any person within U.S. territory which would

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[40]E.H.S. Law Bulletin Series, Japan, Vol. II, PA 17.

[41]Id, PA 1.

constitute a violation of Articles 77-79 if committed within Japanese territory is prosecutable in the courts of Japan.[42]

Testimony that one supplied firearms allegedly to be used in an attempt to assasinate the Emperor of Japan would supply an investigatory lead to a prosecution under Article 79 for furnishing arms to aid in the commission of acts violative of Articles 77-78. Articles 1, 6 and 7 of the Japanese Constitution describe the role of the Emperor:

> "ARTICLE 1. The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.
>
> * * *
>
> ARTICLE 6. The Emperor shall appoint the Prime Minister as designated by the Diet.
>
> 2. The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.
>
> ARTICLE 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:
>
> (1) Promulgation of amendments of the constitution, laws, cabinet orders and treaties;
> (2) Convocation of the Diet;
> (3) Dissolution of the House of Representatives;
> (4) Proclamation of general election of members of the Diet;
> (5) Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers;
> (6) Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights;
> (7) Awarding of honors;
> (8) Attestation of instruments of ratification and other diplomatic documents as provided for by law;
> (9) Receiving foreign ambassadors and ministers;
> (10) Performance of ceremonial functions."[43]

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[42]This distinguishes such cases as In re Quinn, 525 F.2d 222,223 (1 Cir. 1975) and In re Cahalane, 361 F.Supp. 226, 227 (E.D. Pa. 1973) where the law under which the witness would purportedly incriminate himself if he testified had no application to acts committed within the U.S.

[43]Henderson, Dan Fenno (Ed.), The Constitution of Japan, Its First Twenty Years: 1947-67 (Univ. of Washington Press, 1968), Appendix, pp. 301-303.

By his title and duties, the Emperor embodies the authority of the State of Japan. An attack upon him, as symbol and representative of the State, would be an attack upon the State, and as such, while such an act by itself would not be sufficient to justify a conviction under Articles 77-79, it could well provide an investigatory lead to a prosecution thereunder or a link in a chain of evidence which would be sufficient to obtain a conviction.

That attempted assassination of the Emperor of Japan could be so viewed is demonstrated by consideration of Title 18 U.S.C. Section 2385, which specifically recognizes that "the assassination of any officer of... government" may be part of an attempt to overthrow the government. When, in fact, an assassination attempt was made on U.S. officials, the government successfully prosecuted the alleged assassins for seditious conspiracy to overthrow the government under a companion statute, 18 U.S.C. Section 2384. U.S. v. Lebron, 222 F.2d 531 (2 Cir. 1955).[44]

In the setting then in which the questions regarding their alleged transfer of firearms to the Chins were asked - a trial of the Chins for possession of guns which were, according to the government, to be used

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[44]The District Court expressed doubt whether Article 77 "extends to assassination of the Emperor, who under the Constitution, is emphatically not the sovereign but is 'the symbol of the State and of the unity of the people.'" 418 F.Supp. at 217. We believe this statement fails to distinguish between testimony which in itself would make out a criminal offense and testimony which might provide an investigative lead to a prosecution. It is the latter which establishes the danger of self-incrimination. For the reasons set forth supra, an attempted assassination of the Emperor, even assuming arguendo the largely symbolic character of his responsibilities, might provide such an investigatory lead.

to assassinate the Emperor of Japan and which, again according to the government, were furnished the trial defendants by appellees, testimony by either appellee might have provided an investigatory lead for prosecution under Article 79 of the Japanese Penal Code. Accordingly, giving testimony would have posed a not incredible danger, U.S. v. Coffey, op. cit., of self-incrimination.

B. THERE WAS A REASONABLE POSSIBILITY THE TESTIMONY OF EACH APPELLEE MIGHT BE USED AGAINST HIM IN A PROSECUTION UNDER JAPANESE LAW.

Appellees further had a legally cognizable fear testimony given by them would not only be self-incriminating but might be used in a prosecution of them under Japanese law.

The District Court stated "the alleged fear of Japanese prosecution is too chimerical to be a factor; there is no more reason to expect prosecution than to expect the Japanese court to exclude the testimony as coerced." Supra at 217. This 'more likely than not' formulation does not accurately reflect the applicable legal standard, which is the possibility of prosecution, rather than its likelihood. In In re Master Key Litigation, 507 F.2d 292 (9 Cir. 1974), for example, a witness who was an employee of a defendant, refused on grounds of self-incrimination to answer questions on an oral deposition in a civil antitrust action. The plaintiff sought to compel him to testify, arguing there was not the "remotest chance" he could be criminally prosecuted. The Ninth Circuit unanimously rejected this contention in language which applies here:

> "Although the federal government and the states do not appear particularly interested in bringing

> criminal actions against the defendant corporations or their employees, the right to assert one's privilege against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution." Id at 293 (Emphasis in original).

In In re Tierney, 465 F.2d 806 (5 Cir. 1972), the Court noted the possibility of prosecution exists where the witness might travel to the country in question or where that country may seek to extradite him. In arguing the Supreme Court should examine this question, Justice William O. Douglas stated:

> "It is not enough to say that petitioners are not subject to a foreign jurisdiction: At any time petitioners could be traveling in a foreign country or find themselves the subjects of various international extradition treaties." Tierney v. U.S., 410 U.S. 914, 915-916 (1973) (dissenting from denial of cert.)

There exists an extradition treaty between the U.S. and Japan which was concluded in 1886 and supplemented in 1906. Under it, each country agreed to deliver up certain persons, including its own citizens, who were charged with certain offenses:

> "Article I.
>
> The High Contracting Parties engage to deliver up to each other, under the circumstances and conditions stated in the present Treaty, all persons, who being accused or convicted of one of the crimes or offenses named below in Article II, and committed with the jurisdiction of the one Party, shall be found within the jurisdiction of the other Party.
>
> Article II
>
> 1. Murder, and assult with intent to commit Murder."[45]

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[45] Treaties, Conventions, International Acts, Protocols And Agreements Between the United States of America And Other Powers, 1776-1909 (Gov't. Printing Office, 1910), Vol. I, p. 1026.

Extradition treaties are to be liberally construed. Valentine v. U.S., 299 U.S. 5 (1936).

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements . . . [O]bligations should be deliberately construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." Factor v. Laubenheimer, 290 U.S. 276, 293-4 (1933) (citations omitted.)

In Cohn v. Jones, 100 F. Supp. 639, 645 (S.D. Iowa, 1900), the Court addressed the problem of construing common law or general terms often used to denote extraditable offenses:

> "When an extradition treaty uses general names, such as 'murder', 'arson', and the like, in defining the classes of crimes for which persons may be extradited, the question of whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for."

See also U.S. v. Guay, 11 F. Supp. 806 (N. Hamp. 1935), mod. 87 F.2d 358 (1 Cir.), cert. den. 300 U.S. 678 (1936); U.S. v. Stockinger, 170 F. Supp. 506 (E.D.N.Y. 1959); Greene v. U.S., 154 F. 401 (5 Cir. 1907). Thus, persons may be extradited for acts which fall within the generic categories specified by the extradition treaty, regardless of the specific title of the offense for which they are being extradited. Assassination of Emperor Hirohito would therefore fall within the generic term of "murder". Consequently, at the time appellees were questioned, there existed a possibility of extradition and therefore a possibility

of prosecution.[46]

Moreover, there was no guarantee their testimony would not be used against them in a trial in Japan. The immunity United States courts could provide Yanagita and Kondo from direct or indirect use against each of his own trial testimony is necessarily limited to jurisdictions within the United States. See Murphy v. Waterfront Commissioner, 378 U.S. 52 (1964). U.S. Courts lack the ability to control what evidence is admitted in prosecutions in foreign countries.[47] Thus, a grant of immunity

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46 Certainly there was no assurance by the appropriate Japanese authorities that no extradition of appellees would be sought or by the appropriate U.S. authorities that a request for extradition would not be acceded to.

The District Judge correctly suggested any testimony appellees might give could not be used in an extradition proceeding against them. Supra at 217-18. However, it by no means follows, as the District Judge appears to have assumed, that there would not have been other evidence against appellees sufficient to warrant their extradition. The magistrate in an extradition proceeding need only find probable cause to believe the defendant committed the crime alleged, not proof beyond a reasonable doubt. Shapiro v. Ferrandina, 478 F.2d 894, 905 (2 Cir. 1973). Hearsay is admissable, Shapiro, supra at 901-902, as are unsworn statements. Collins v. Loisel, 259 U.S. 309, 317 (1922).

Apart from any testimony appellees might have given, there was ample evidence on which to base a finding of probable cause. In addition to the disposition notices with Yanagita's signature, indicating he had sold two of the firearm's to Chin, and the firearms transaction record from the Treasury Department, Bureau of Alcohol, Tobacco and Firearms, listing Kondo as the purchaser from a sporting goods store of one of the other firearms, see fn. 38 supra and Gb 2, fns. 1 and 2, there was also the signed, sworn statement of appellee Yanagita, dated October 24, 1975, given to an ATF agent, in which he states he sold two of the firearms in question to Young Chin. (Exhibit G to April 11, 1976 Affidavit of James Reif. See fns. 12 and 14 supra).

47 Moreover, a U.S. court does not have the power to prevent extradition because the procedure under which the person will be tried in the foreign jurisdiction does not comport with U.S. standards of justice. Neely v. Henkel, 180 U.S. 109 (1901); Gallina v. Fraser, 177 F.Supp. 856 (D. Conn. 1959), aff'd. 278 F.2d 77 (2 Cir. 1960), cert. den. 364 U.S. 851.

pursuant to 18 U.S.C. Sections 6002-3 was necessarily insufficient to adequately protect appellees from use of their trial testimony against them in a Japanese prosecution.

Some federal courts faced with similar claims by grand jury witnesses have asserted that F.R. Crim. P. 6(e), which provides for secrecy of grand jury proceedings, constitutes an adequate substitute for the lack of jurisdiction and control over foreign proceedings. It is contended the secrecy of the proceeding would prevent the testimony from ever falling into the hands of a foreign prosecutor and thus there need be no concern for the lack of power to control that prosecutor's use of evidence he obtains. E.g., In re Tierney, supra at 811-812; In re Parker, 411 F.2d 1067, 1069-1070 (10 Cir. 1969), vacated and dism. as moot 397 U.S. 96 (1970). Elsewhere, this view has been sharply disputed and rejected. E.g., In re Cardassi, 351 F.Supp. 1080, 1082-1083 (D. Conn. 1972). See also Tierney v. U.S., 410 U.S. 914, 195-196 (1973) (Douglas, J., dissenting from denial of certiorari).

Whatever the merits of these opposing positions, they are of no concern here. For unlike the witnesses in Tierney, Parker and Cardassi, Yanagita and Kondo were not grand jury witnesses but witnesses at a public trial whose proceedings were recorded and a matter of public record.[48] There is, therefore, no possibility, on the facts presented here, that

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[48] It is also to be noted the Chin trial generated an unusual amount of publicity. Articles appeared in metropolitan newspapers when the Chins were arrested, after the trial of Elizabeth Chin in April, 1976 and after the joint trial at which Kondo and Yanagita were held in contempt. E.g., Exhibits D, E and F to April 11, 1976 Affidavit of James Reif. See fns. 12 and 14 supra.

either can be adequately protected, either by statute or rule, from foreign use of his testimony.

C. THE FIFTH AMENDMENT PROTECTS APPELLEES AGAINST SELF-INCRIMINATION UNDER ARTICLES 77-79 OF THE JAPANESE PENAL CODE.

This Court is thus squarely presented with the constitutional question left unresolved in Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972); see also 401 U.S. 9 , 934 (1971): whether the Fifth Amendment privilege protects a witness in a proceeding in a U.S. Court against self-incrimination under the laws of a foreign jurisdiction. In Murphy v. Waterfront Commissioner, 378 U.S. 52 (1964), the U.S. Supreme Court held the Fifth Amendment protects a witness from giving testimony in one jurisdiction which incriminates him under the laws of a second jurisdiction.

In concluding the Fifth Amendment protects a witness before a state investigating commission from self-incrimination under federal law, the Court relied upon the "settled" English rule regarding self-incrimination under the law of a foreign jurisdiction, U.S. v. McRae, L.R. 3 Ch. App. 79 (1867). In McRae, the U.S. had sought discovery against an individual in the British courts. The English Court of Chancery Appeals denied the application upon the ground that providing the information sought would incriminate the person under U.S law and that the individual therefore was privileged to decline to produce in English courts that information. The U.S. Supreme Court relied substantially upon McRae:

> "The most recent authoritative announcement of the English rule has been made in 1867 in U.S. v. McRae, where the Court of Chancery Appeals held that where

> there is a real danger of prosecution, the case could not be distinguished in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for breach of our own municipal law." Murphy v. Waterfront Commissioner, supra at 77 (citations omitted).

The Court explicitly based its holding in Murphy on this interpretation of English law:

> "In light of the histories, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts . . ." Supra at 77.

It is therefore apparent that protection against self-incrimination under the law of a foreign jurisdiction is within the scope of the Fifth Amendment privilege against self-incrimination as defined by the Supreme Court in Murphy.

This issue has been directly considered and decided in In re Cardassi, 351 F.Supp. 1080 (D. Conn. 1972) in which Judge Jon O. Newman held that the Fifth Amendment privilege protects against self-incrimination under the laws of a foreign jurisdiction. Rather than discuss Cardassi at length, we commend Judge Newman's thoughtful opinion to this Court's attention.

Apart from In re Cardassi, only one other Court has addressed this question. In a cursory alternative holding, the Tenth Circuit Court of Appeals merely stated, without amplification, that the Fifth Amendment

> "need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation. The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the U.S." In re Parker, 411 F.2d 1067, 1070 (10 Cir. 1969) (footnote omitted).

The judgment and opinion of the Circuit was subsequently vacated and case dismissed as moot. Parker v. U.S., 397 U.S. 96 (1970).

The fact other nations may make failure a crime (we are unaware of any such provision) is irrelevant to the Fifth Amendment question posed here. Insurrection or overthrow of the government is undoubtedly a crime under the laws of every state, including those of the United States. See, e.g., 18 U.S.C. Sections 2383 et. seq. Moreover, if the concern of the Parker court is that witnesses will refuse to testify, claiming the danger of self-incrimination under foreign laws for crimes such as "failure," the solution is not to narrow the scope of the Fifth Amendment. Instead, the U.S. should exercise its treaty making power against including such offenses in extradition treaties, thus substantially eliminating the danger of use of such self-incriminating testimony in the foreign jurisdiction by substantially eliminating the possibility of prosecution for such an offense at all. We also note Judge Newman expressly declined to follow Parker in In re Cardassi, supra.[49]

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[49] There exists a privilege against self-incrimination under Japanese law. Article 38 of the Japanese Constitution provides: "No person shall be compelled to testify against himself." See Henderson, supra, Appendix, p. 306. See also Article 146 of the Code of Criminal Procedure: "A person may refuse to answer to any question which may tend to incriminate him." The Constitution of Japan And Criminal Laws (1951), p. 62. However, Japan has not enacted compulsory testimony or so-called immunity legislation. See B.J. George, Jr., "'The Right of Silence' in Japanese Law" in Henderson, supra at p. 275.

The District Judge expressed the view that "if the foreign jurisdiction recognizes a privilege against self-incrimination and rejects judicially compelled self-incriminatory testimony, it would and could be expected to recognize the rule in the Murphy case or a comparable rule." 410 F.Supp. at 217. Firstly, as Japan does not have compulsory testimony legislation, it is not at all clear its Courts would hold "immunized" self-incriminating testimony given in a foreign court inadmissable at a trial of the giver of the testimony.

The facts presented are relatively unique. Murphy and Cardassi indicate that in the unusual circumstances of extra-territorial application of foreign criminal laws and the possibility of extradition, the Fifth Amendment stands as a guarantee against disclosures self-incriminating under foreign law. Appellees should not therefore have been ordered to testify.

Secondly, it may be arguable that the Japanese court would apply a rule equivalent to that enunciated in Murphy, but it is certainly possible (which is the test) it may not. It is possible it might apply the so-called "two sovereignties rule," in effect for so many years in the United States. See Feldman v. U.S., 322 U.S. 487 (1944); U.S. v. Murdock, 284 141 (1931). Under this rule, self-incriminating testimony compelled in one jurisdiction was admissable in a criminal proceeding in a separate jurisdiction (even if that jurisdiction was also within the United States).

The District Judge's formulation, if carried to its logical extreme, would mean a federal court could compel testimony self-incriminating under state law without affording the witness protection under the Fifth Amendment against use of his testimony against him in a state proceeding, merely on the ground that since it appeared there was a privilege against self-incrimination under state law the witness was adequately protected. This cannot be squared with Murphy. Moreover, it fails to take account of the reality that since the U.S. cannot control the development of rules under state or Japanese law, what appears to be the law of those jurisdictions one day may not be the next.

Notwithstanding Article 38 of the Japanese Constitution, therefore, there remains the possibility of the use of appellees' testimony against them in criminal proceedings in Japan.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: December 31, 1976

Brooklyn, New York

Respectfully submitted,

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